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In the
United States Circuit Court of Appeals
For the Ninth Circuit

EVERETT FRUIT PRODUCTS CO., a corporation,
Plaintiff in Error

vs.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, co-partners, doing business under the firm name and style of HOFFMAN & GREENLEE,
Defendants in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HON. GEORGE M. BOURQUIN, JUDGE

Brief of Defendants in Error

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STATEMENT OF THE CASE

The Plaintiff in Error's brief presents twenty-five assignments of error, several of which are subdivided,

some with as many as six claims. Of necessity the majority of these assignments deal with error of practice. As the issue on the merits is relatively simple, in aid of clearness we take the liberty of departing from the method of presentation by the Plaintiff in Error and shall discuss first what we deem the issue on the merits and thereafter attempt to answer as many of the assignments of error as we deem material.

Omitting the formal allegations the complaint of the Defendants in Error is as follows:

"III.

"On the 6th day of August, 1924, the plaintiffs herein and the defendant entered into a written contract whereby the defendant agreed to sell and the plaintiff agreed to purchase two thousand (2,000) cases, equalling four thousand (4,000) dozen, size 2½ cans, of canned sub-standard pears at the agreed purchase price of $2.50 per dozen, less 4% brokerage, to be of the 1924 pack of pears as packed by the defendant, which is a corporation engaged in the canning and sale of fresh fruits and vegetables; the said pears were sold subject to approval of sample and were sold for delivery F. A. S. Steamer, to be delivered when packed, upon the following terms: 2% 10 days, Net 30 days, sightdraft to accompany bill of lading, a true copy of said contract, together with the terms and conditions thereof, is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

IV.

"That on August 11, 1924, the parties hereto entered into another contract wherein the plaintiff agreed to purchase and the defendant agreed to sell an additional three thousand (3,000) cases, constituting six thousand (6,000) dozen, of canned substandard pears of the same kind and description as mentioned in the foregoing paragraph, the contract for the purchase of which was in the same terms and conditions and on the same form as the foregoing mentioned contract, hereto attached, marked Exhibit "A", differing therefrom only as to the date thereof, the amount of pears to be sold thereunder, which said contract had this additional condition stated on the face thereof, to-wit: subject to *pro rata* delivery.

V.

"That the defendant's 1924 pack of pears was ready for delivery on October 1, 1924, but the defendant failed and refused to tender to the plaintiffs or submit samples to the plaintiffs of any of the cases or cans of pears of the qualitiy and kind contracted for in the foregoing contracts, although requested and demanded so to do, to the damage of the plaintiffs herein in the sum of * * * $4,000.00."

The material parts of the contract referred to in the complaint are as follows:

"EXHIBIT A."

"Everett Fruit Products Co.
Everett, Washington. No. 2798
Contract Form
No. 260

SELLS TO Aug. 6, 1924
Hoffman Greenlee, Buyer
of San Francisco, Cal. Consign to_____
Goods specified as per con-
tract on reverse side Destination _____
Walter C. Zinn Co.,
Broker,
San Francisco, Cal. Routing _____
Address _____. Time of Shipment
when packed _____
Sign on Reverse Side.

Cases	Dozens	Size	Grade	Variety	Brand
2000	4000	No. 2½	Sub. Std.	Pears	

Price per doz. $2.50 — Do not use these columns

Less 4% Brokerage
1924 pack
subject approval sample
Price F. A. S. Steamer, Everett, Wash.
TERMS: 2% 10 days N-30
S-D; B-L
If for export, ½ of 1% swell allowance.
If buyers labels, usual label allowance.
Wood cases.

Buyer's Copy.

FRUIT AND-OR VEGETABLE CONTRACT

As Per Specifications on Reverse Side

TERMS OF PAYMENT. Cash less 2%, payable in New York or Seattle exchange when paid within ten days or on receipt of invoice with documents.

MARINE INSURANCE. * * *

CONDITIONS. The prices specified are for goods "Free on Board" at factory. The seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligation shall at once terminate and cease.

In case of short pack by reason of which seller is unable to make full delivery of any of the grades specified, it is mutually agreed that deliveries are to be prorated.

Goods to be shipped at seller's discretion as soon as practicable after packing unless otherwise specified.

FRUITS remaining unshipped * * *

SWELLS * * *

GUARANTEE. Seller guarantees goods covered by this contract to conform with the requirements of the National Food and Drugs Act of June 30th, 1906, except seller is relieved from any responsibility for misbranding when goods are not shipped under its labels.

This contract to be binding upon the seller must be confirmed in writing by the seller, who, however,

shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within 20 days of the date thereof.

ARBITRATION. Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration, by the regular canned goods and dried fruit arbitration boards, either in the cities of New York, Chicago, San Francisco, or Portland, unless otherwise mutually agreed upon. If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract. Party against whom decision is rendered, shall pay arbitration fees and expenses incurred. If decision is rendered that seller has complied with contract, invoice if unpaid shall become due and payable at once. If decision is rendered against seller, arbitrators shall determine amount of allowance, which amount shall be payable at once. If the arbitrators decide the seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance of this contract. No unimportant variation in the execution of this contract shall constitute basis for claim.

Buyer HOFFMAN & GREENLEE.
C. C. BOOBAR.
EVERETT FRUIT PRODUCTS CO.,
Seller.

By F. B. WRIGHT.

Broker_____."

The Plaintiff in Error's answer (Tr. p. 10) "denies that the defendant failed or refused to deliver

to the plaintiffs or submit samples to the plaintiffs of any of the cases or cans of pears of the quality and kind contracted for in the contracts referred to in said complaint, and denies that the plaintiffs were damaged in the sum of Forty Cents (40c) per dozen cans," and affirmatively alleges in substance:

"The corporate capacity of the plaintiff in error and that it was engaged in the business of canning and selling fruit at Everett, Washington; that during the season of 1924 at its plant in Everett it canned pears of a grade called 'Sub-Standard'; that this grade was the grade covered by the agreement; that after the said grade of pears was so packed it delivered to Hoffman & Greeley samples of such grade of pears and that they had the pears so packed inspected at its plant at Everett and that Hoffman & Greeley failed and refused to approve such samples and rejected the samples, and refused to approve the pears as packed by it after inspection, and failed and refused the pears and order delivery thereof. (Tr. p. 11.)

The Defendant in Error denied the affirmative matter by reply. (Tr. p. 13.) At the close of the testimony in the case both parties moved for directed verdict (Tr. 117 to 19). The trial court determined the laws of the case as follows:

"The contract in this case is a contract for the purchase of a certain amount of canned pears of a well-known and standard grade in the trade, called sub-standards or seconds. Taking the contract as a

whole, it is very apparent that both parties intended it in good faith and by them each to be performed in good faith. The defendant was to furnish pears of the grade for which he had contracted, and the plaintiff to take those pears providing they were of that grade and approved even as it might be to his sense of taste.

"In respect to the sample. The contract contained the term 'subject to approval of sample'. A party who contracts in that fashion leaves the question of approval entirely to the other party. He is not obliged to do it. The evidence in this case is that they did, however, for the defendant shipped those samples down to San Francisco to Zinn & Company and by Zinn & Company they are submitted to the plaintiff. You leave the question of approval then of the material to be furnished in the contract entirely to the buyer as was done in this case. Of course, there is a reason why the Plaintiff did want samples before it accepted the goods. The goods were to be packed in Washington and the plaintiff's home office, at least so far as it appears, its only place of business was in San Francisco and it desired to inspect the fruit at least that far before it consented to receive it and hence this stipulation as to the approval of the sample. The law in reference to that is this:

"It is a binding contract and the parties leave it to the buyer to say whether he will approve the sample, but he is obliged to act in good faith and have motives of honesty and justice to the other party. He still has the right to say there is that in the fruit that does not meet his approval and that rejects it and he would still be entitled as the Court views it in

this case to recover his damage. It is not a question of whether the pack would be sufficient to satisfy the contract because the buyer in this case stipulated that he should be satisfied with the sample. In other words, if the sample would not please him and if he acted in good faith, not from any dishonest purpose, and found the goods did not come up to the standard, his judgment is final and conclusive and could only be impeached if there was evidence in the case to warrant the jury to find that the buyer, namely the plaintiff in this case, was acting in bad faith and should have been satisfied where he said he was not satisfied.

"For these reasons the Court will grant the motion of the plaintiff for directed verdict and will deny a like motion for the defendant. That is to say, the plaintiff is entitled to recover. How much he is entitled to recover will be left for the jury to determine." (Tr. 119-121)

ARGUMENT.

I.

Were the Contracts Without Consideration and Lacking in Mutuality.

After careful study of many cases we feel unable to state the law of this case more clearly than did the Trial Judge in the foregoing decision on the motions for directed verdict. The following addition,

suggestions and authorities seem to us to amply fortify his lucid statement of the law.

If the contracts in this case had not contained the clause "subject to approval of sample" there can be no doubt but that the contracts would have satisfied every requirement of consideration and mutuality. No authority is suggested to the contrary.

> *Dement Bros Co. vs. Coon*, 104 Wash. 603, 177 Pac. 354.

All witnesses for both parties agreed that "Sub-standard" described a canned pear of well defined qualities in the trade. The contracts therefore calling for sale of "Sub-standard" pears entitled a buyer to reject pears that inspection showed did not conform to this quality. A suit for damages for breach of contract to deliver pears of this quality, for rescission if the purchase price had been paid, or for breach of warranty had the goods been accepted and protest made of their quality would have been maintainable by the defendant in error except as the provision in the contract "subject to approval of sample" may modify these general principles of law:

> *Jolly vs. Blackwell & Co.*, 122 Wash. 620, 211 Pac. 748.

> *Peterson vs. Denny-Renton Clay & Coal Company*, 89 Wash. 141, 154 Pac. 123.

Springfield Shingle Company vs. Edgecomb Mill Company, 52 Wash. 620, 101 Pac. 233.

Burgner-Bowman Lbr. Co. vs. McCord-Kistler Mercantile Co., 216 Pac. 815, 35 A. L. R. 242 and note.

The provision in the contract that samples must be submitted for approval clearly was intended as a method of inspection of the goods offered in fulfillment of the contract. This is well stated in an early case decided by Judge Sawyer of this circuit in *Silsby Manufacturing Co. vs. Towner of Chico*, 24 Fed., p. 893. The learned Judge stated:

"The only question in the case upon which I have any difficulty arises out of the following provision of the contract: 'The Salsby Manufacturing Company will send the above described steam fire engine to Chico, subject to the approval of the fire committee and will warrant the workmanship finished and performance of the machine satisfactory to them or remove the same without expense, etc.'

"The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser it must be satisfactory to him or he is not required to take it. It is not enough that he ought to be satisfied with the article, he must be satisfied or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be his own judge and if he deliberately enters into such an agreement he must abide by it. To this effect are *McCarren vs. McNulty*, 7 Gray, 139; *Brown*

vs. Foster, 113 Mass., 136; *Zaleski vs. Clark*, 44 Conn., 218; *Gibson vs. Cranage*, 39 Mich., 49; *Gray vs. Central Ry. Co.*, 11 Hun. (N. Y.) 70; *Hallidie vs. Sutter St. R. Co.*, 63 Cal., 575; *Heron vs. Davis*, 3 Bosw., 336; *Wood Machine Co. vs. Smith*, 50 Mich., 570; *S. C.*, 15 N. W., Rep., 906; *Hoffman vs. Gallagher*, 6 Daly., 42."

In the case of Livesley vs. Johnston, 45 Or. 30; 76 Pac. 13; 106 Am. S. R. 647; 65 L. R. A. 783, Judge Wolverton, while a Supreme Justice in Oregon, wrote the opinion in a case involving a suit for breach of contract by a buyer of 2,000 pounds of hops, where the seller had refused to deliver, claiming that the contract lacked mutuality because of a clause therein which allowed the buyer or his agent to determine whether the hops tendered were of the grade required by the contract. The Court in part said:

"Ordinarily the purchaser of a commodity has a right of inspection upon delivery before acceptance and if it does not correspond in kind, quality, condition or amount to that which is purchased or contracted for, he may reject it. (Citing Benjamin and Mechem on Sales.) The purchaser is conceded the exercise of his judgment, but he exercises it at his own peril, and, if he rejects the commodity, which nevertheless comes up to the stipulated standard, he is yet bound for the purchase price, and the seller may recover it of him on proof that he has complied with the terms of the sale. Many cases are to be found where work is agreed to be done, articles furnished, or goods delivered upon sale, to the satisfaction of an-

other, and it is uniformly held that the person to be benefited may exercise his choice of rejection or acceptance, without assigning any reason therefor. That he ought to be satisfied, or that the work, articles, or goods would be satisfactory to a reasonable man or to a court or jury, will not avail as against the exercise of his convictions of sentiment. It is sufficient that he is not satisfied, and his own determination must be taken as final and conclusive."

The court then reviews the various holdings and concludes as follows:

"Within the undoubted doctrine of these cases, the contract under consideration was one which the parties had a right to enter into, and the clause leaving the quality and condition of the hops at the time of delivery to the judgment of the buyer does not render it void of mutuality. Livesley & Co. could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves or through their agent so rejected them they would nevertheless be bound for the price."

District Judge Bellinger in *Lilienthal Bros. vs. Stearns* in 121 Fed. 197, held that the buyer's complaint for breach of contract on a similar hop contract stated a cause of action.

Again in the case of *Lehman vs. Salzgeber*, 124 Fed. 479, Judge Bellinger held a contract of this form binding and the subject for an action for damages by the

purchaser where the seller failed to deliver the hops accordging to agreement.

Judge Lurton, while sitting in the Sixth Circuit with Justices Taft and Severyns in *Michigan Stone & Supply Company vs. Harris*, 81 Fed. 928, held a contract enforceable which required that a transcript of the proceedings showing the legality of an issue of bonds to the satisfaction of the purchaser's attorney did not lack mutuality. As usual of the learned Judge's decisions, the case contains a careful and excellent statement of the law with reference to situations similar to the present one.

Justice Shelby of the Fifth Circuit in the case of *Parlin & Orendoff Company vs. Greenville*, 127 Fed. 55, also has made a careful statement of the law involving the same principle and interpreting a contract of the same general meaning as there is involved in the present suit.

See also *Preece vs. Wolford*, 246 S. W., 27 (Ky.)

The applicable principle is thus announced in 13 C. J., p. 337 Contracts, Sec. 184, "The right of one party to determine whether or not services, goods etc., tendered under the contract are satisfactory or such as he will accept, will not render the contract unilateral where the right so conferred by the contract cannot be construed as giving a permission to reject arbitrarily."

The plaintiff in error deals with this phase of the case under sub-division 6, p. 34, of its brief. The cases cited, with one possible exception, have no application to the facts of this case. The majority of the cases cited merely are written offers that if a buyer decides to purchase of the seller that the seller will sell at a certain price. The exact limitations on this doctrine are immaterial to the present issue.

The remainder of the citations are given over to the proposition that *if a buyer can arbitrarily, for mere whim, reject a tender of performance,* by a seller on the ground that he is not satisfied, that then the contract lacks mutuality. The Washington cases of *Taton vs. Geist,* 46 Wash. 226; 89 Pac. 547; and *McDougall vs. O'Connell,* 72 Wash. 349; 131 Pac. 204, illustrate this principle, but these cases must be read in conjunction with *Yarno vs. Hedlund Box & Lumber Company,* 129 Wash., 457; 225 Pac. 659; and *Gould vs. McCormick,* 75 Wash., 61; 134 Pac. 676, to understand the rule in this state with respect to what should satisfy a contracting party and to what character of contracts the principles apply.

If this principle does not apply to such work as the preparation plans of buildings as held in the *Gould* case, it would seem strange that it should apply to "Sub-standard" pears whose quality and character-

istics, all witnesses agreed, *were thoroughly established in the trade.*

The only case cited by the plaintiff in error suggesting a contrary view is *Joliet Bottling Company vs. Joliet Citizens' Brewing Co.*, 98 N. E. 263 (Ill.) This case is distinguishable because it involved a contract for furnishing a beer not of a particular standard quality, but of the defendant's brew, which was to be satisfactory to the purchaser. Fancy and taste, even whim, of the purchaser may have been intended as a guide. The portion of the decision quoted in the brief, however, has been severely criticized, particularly by Prof. Williston, in his treatise of contracts, p. 75, where he says there is no warrant for the statement in this case that the purchaser could reject at its pleasure.

Another case cited under sub-division 7, of the plaintiff in error's brief, at page 44, *Hurley-Mason Company vs. Stebbins-Walker*, 79 Wash. 366, 140 Pac. 381 is urged for the proposition that when samples were rejected, even if there were a binding contract in the first place, that the contract was terminated and no action for damages follow. We submit that this is an incorrect interpretation of the *Hurley-Mason* case and, in any event, the case has no application to the present situation. The issue in the *Hurley-Mason* case was this:

A dealer contracted to sell cement, subject to elaborate tests. The purchaser accepted the cement without making the test and later attempted to sue for damages, claiming that the provision in the contract for tests was a warranty that the cement would meet these tests. There was no claim by the buyer that the material furnished was not the grade of cement called for by the trade name under which it was purchased. The Court points out repeatedly that the action is between a dealer and purchaser and not a manufacturer and purchaser, and if the case is at all applicable, it stands for the proposition that if the buyer accepts without inspection or after inspection fails to notify the seller of the defect, that he cannot complain against the seller for poor quality of the cement delivered. If the principles announced in the *Hurley-Mason* case should be applied to the facts of the present case when the samples were tendered to the defendant in error, if the defendant in error had accepted the samples it could not later complain of the quality of the pears. The contracts in the present case, however, provide that any dispute arising over the proper fulfillment of the contracts, including questions as to quality, shall be settled by a particular method of arbitration. This provision of arbitration, if the *Hurley-Mason* rule is applicable, must therefore mean that disputes as to the quality of samples shall

be submitted to arbitration. This the defendant in error repeatedly requested and the plaintiff in error steadfactly refused to concede. (Plaintiff's Exhibit E-1, Tr. p. 55.)

There is a further reason which shows that the contract in the present case is not one involving mere fancy or taste of the purchaser of the pears. The arbitration clause just quoted provides for an arbitration of quality by the Board of the regular canned goods and dried fruits arbitration boards, sitting in certain cities. If a dispute arose, the contract itself took the matter of the determination of the quality of the goods offered out of the buyer's hands and placed it in a well known trade board.

On the legal interpretation of the contract we therefore submit that the trial court came to an exactly correct conclusion.

Measure of Damage

On page 45 of the plaintiff in error's brief, under sub-division 8, it is urged that the instruction as to the measure of damage is incorrect. This is based on testimony that the defendant in error had re-sold the pears to the California Packing Corporation on the same terms and conditions so far as quality was concerned. The Washington case of *Keen vs. Swanson*,

129 Wash. 269, is the plaintiff in error's sole reliance in support of this proposition. Your Honors have already determined the proper measure of damage applicable in this form of action.

Stetson Post Lumber Company vs. Commercial Sash & Door Company, 299 Fed. 553 (9th Circuit). The Supreme Court of the State of Washington has applied the identical measure of damage applied by trial court in the following cases:

Stimson Mill Co. vs. Rogers Mylroie Lumber Co., 115 Wash. 589, 197 Pac. 919.

Coast Fir Lumber Co. vs. Puget Sound Mills & Timber Co., 117 Wash., 515, 201 Pac. 747.

National Steel Car Corp. vs. Schwager & Nettleton, 124 Wash. 557, 214 Pac. 1049.

Meyer Brothers Drug Company vs. Campion, 120 Wash. 378, 207 Pac. 670.

Pearce vs. Puyallup & Sumner Fruit Growers' Canning Co., 117 Wash. 612, 201 Pac. 905.

Sussman vs. Gustav, 116 Wash. 275, 199 Pac. 232.

In the present case the testimony shows that there was an existing market for "Sub-standard" pears on the Pacific Coast and at Everett, Washington, at the time for delivery stipulated in the contract. The evidence nowhere shows that the defendant was advised

until after the contract of sale was executed that the plaintiffs were intending to re-sell the pears.

The case of *Keen vs. Swanson*, cited by the plaintiff in error, involved the sale of a particular kind of canned clam which were purchased for re-sale to the knowledge of the seller, which could not be replaced on the open market and in final analysis is simply one of those cases of an absence of proof of a better measure of damage the re-sale price was taken. The case was prosecuted to the Supreme Court without representation of the buyer by counsel and, if interpreted as the plaintiff in error desires, is in direct conflict with two other decisions of the Supreme Court, one an *en banc* decision:

Coast Fir Lumber Co. vs. Pg. Sd. Mills & Timber Co., 117 Wash. 515.

Stimson Mill Co. vs. Roger Mylroie Lumber Company, 115 Wash. 589.

The inapplicability of the rule claimed by the plaintiff in error is well illustrated in the following N. Y. cases:

Finkelstein vs. Selwitz, 139 N. Y. S. 122.

Lowenstein vs. Hargraves Mills, 125 N. Y. S. 1090.

McManus vs. American Woolen Co., 110 N. Y. S. 680.

Judge Learned Hand in *Mitsubishi Shoji Kaisha vs. Davis*, 291 Fed. 882, considers the measure of damage as applied to a shipment of steel rails and there held that the difference between market value and contract price and not the difference between contract price and resale price govern the measure of damage. Certain New York decisions were claimed to state a definite rule, but the court said:

"I think it very doubtful in any event whether, if there had been no market price, the plaintiff could recover more than the value at the time of delivery. In such matters this court, while always treating the decisions of the New York courts with that deference to which they are in fact so well entitled, does not regard them as in any sense authoritative; the question being one of general law. Unquestionably when the cause sounds in contract the general rule is that to recover special damages the buyer must allege and prove that he advised the seller of an existing contract which he needed the goods to fill, and that it is not enough merely to show that the seller knew that the buyer intended them for resale."

See also *Howard Supply Co. vs. Wells*, 176 Fed. 512.

Granting Motion for Direct Verdict.

On page 25 of Plaintiff in Error's brief it is urged that the Court erred in withdrawing the case from the jury except to the question of damages.

There was conflicting testimony as to the market value of the pears at the time for delivery. There was no conflict in the testimony on any other material issue. The samples that were offered the defendant in error were drawn at Everett by the plaintiff in error and sent by parcel post to Zinn & Company in San Francisco (Tr. p. 115). A part of these samples were cut in Zinn's office about September 12th and the remainder were given to Hoffman & Greelee (Tr. 53-4). When the first samples were cut Zinn & Company wired the plaintiff in error that evidently they had sent the wrong samples of "Sub-standard" pears for they cut very poor pieces and soft, and should have gone into pie. (Plaintiff's Exhibit E, Tr. 54.) Zinn, the plaintiff's broker was not questioned by the plaintiff in error to contradict in any way the testimony of Hoffman that the cans cut in Zinn's presence were in fact not Sub-standard pears. Hoffman testified that the pears were not up to grade. (Tr. 64 and 65.)

Pratt, sales manager for the California Packing Corporation (Tr. 68), Dodd, manager of the quality and service department of the California Packing Corporation (Tr. 71), Beesemyer, an independent merchandise broker (Tr. 74), on direct examination. Jacobs, manager of the California Canneries Company (Tr. 106), Frey, sales manager of the Cali-

fornia Canneries Corporation (Tr. 109), on re-direct examination, all had examined and cut part of these samples and all agree that the samples were far below "Sub-standard" grade. There is not a syllable of testimony in the record to dispute this fact and nothing to indicate but that the defendant in error exercised its best and honest judgment in passing on these samples. In fact, the plaintiff's own manager on rebuttal testified that samples of pears sent through parcel post were often badly broken up (Tr. 116), indicating that although the entire remainder of the plaintiff in error's pack might be up to sub-standard and that these samples themselves might have been sub-standard grade when they left Seattle that when inspection was made in San Francisco they would have become disintegrated so as not to show compliance of the bulk of the goods to the quality called for in the contract.

The only testimony that could possibly be considered as an attempt to meet the issue of whether the samples submitted were up to grade was testimony of defendant's officers that they inspected the pears packed to this grade daily and that the general pack came up to the requirements. This sort of testimony we submit could not overcome the positive testimony of the men who examined the samples submitted and made no issue for the jury except the ques-

tion of damages. If we are correct in this, the trial court did not err in submitting to the jury only the question of damage.

If we are in error in this the court should then consider whether the motion for direct verdict made by the plaintiff in error and joined in by the defendant in error did not entitle the trial court to take all matters of fact from the jury in any event. There can be little doubt that where both parties join in a motion for directed verdict in the Federal Courts that the trial court is warranted in deciding issue of fact.

The question here is, how long after the court has announced his decision of the case is the losing party given in which to change his mind and request a submission of some issue of fact to the jury?

The plaintiff in error in the present case after the trial court had decided the law of the case and directed the verdict for the defendant took the usual general exception (Tr. p. 121). The argument to the jury followed the court's ruling for motion for directed verdict. The court then instructed the jury as to the measure of damages and at the close of the instructions the counsel for plaintiff in error took his exceptions. The court then directed the clerk to let the records show that the instruction which the court as counsel stated did not

give, and to which he accepts, were presented to the court, laid on the bench after the court had ruled on the motion with respect to the verdict (Tr. 132-33), and the court noted upon the request of instructions that they were laid on the bench after the court determined the parties' motions, each for direct verdict (Tr. 122).

Obviously there must be a time in every law suit when the right to further ask leave to go to a jury on particular issues may be denied. We think the trial court's action in the present action is entirely justified, even if there were an issue of fact for the reason that there was no reservation of any issue of fact in the plaintiff's motion for directed verdict and because a request was untimely.

In *Orr vs. Waldorf-Astoria Hotel Company*, 291 Fed. 343, the court said:

"At the close of the trial both sides moved for an instructed verdict. Plaintiffs in error now say that under the rule laid down in Williams vs. Vreeland, 250 U. S. 295, Empire Cattle Co. vs. Atchison, 210 U. S. 1, and Beuttell vs. Magone, 157 U. S. 154, their motion reserved the right to go to the jury if it should be overruled, that it was not a final submission of the cause on their part. We cannot assent to this. Their motion was put in writing. It embodies stated reasons why it should be sustained, and that part of it entitled, 'Motion to Take from Jury,' and 'Objection,'

contains nothing more than additional reasons in support of the motion. Moreover, we are of opinion that if the case had been submitted to the jury and they had found in favor of plaintiffs in error, it would have been the duty of the court to set the verdict aside."

In *Mayes vs. United States Trust Company*, 280 Fed. 25, the court says:

"The record indicates that its (the defendant's) motion for directed verdict was unaccompanied by request for specific instructions in case the request for directed verdict was denied. By these mutual requests for directed verdict the parties submitted to the trial judge the determination of the inferences proper to be drawn from the facts submitted, and upon this review the court's conclusion of fact must stand, if the record discloses any substantial evidence to support it."

In the foot note to this decision particular reference is made to the case of *La Crosse Co. vs. Pagenstecher*, 253 Fed. 46, there summarized as follows:

"After verdict had been directed for plaintiff, but before the jury had retired, defendant presented further requests to charge, which were denied as coming too late. This ruling was proper. After the court, upon a valid submission for the purpose, had announced its conclusion upon the facts, it was too late to insist upon submission to the jury. Had defendant accompanied its motion to direct verdict with request for specific instructions in case its motion to direct were denied, or had plaintiff not also simultane-

ously presented motion to direct verdict in its favor, the situation would have been different. Breakwater Co. vs. Donovan, 218 Fed. 340; Michigan Co. vs. Chicago Co., 269 Fed. 503."

See also *Thomas-Bonner Co. vs. Hooven Co.*, 284 Fed. 386; *Speelman vs. Iowa State Traveling Men's Association*, 4 Fed. (2nd) 501.

We do not believe the cases cited by plaintiff in error conflict in any way with these decisions.

The Defendents in Error Were Not the Real Parties in Interest.

On page 33 of plaintiff in error's brief it is claimed that the defendant in error was not the party in interest. On cross examination Mr. Longwell, sales director of the California Packing Corporation, was asked if Hoffman & Greelee had assigned the contracts to the California Packing Corporation, and answered "yes." But it will be noticed that the questions were leading in form and it is obvious that Mr. Longwell misunderstood their meaning and only intended to testify that the California Packing Corporation had purchased the goods covered by the contract for he testified in another place, "I stated that I was there (at Everett) to inspect pears in the interests of the California Packing Corporation that had been purchased from Hoffman & Greelee, provided they had

samples of lot of second pears to submit to me." (Tr. p. 100.) Hoffman, one of the plaintiffs (Tr. p. 67), Pratt salesmanager of the California Packing Corporation, Tr. p. 69), both testified that canned pears were purchased from Hoffman & Greelee on the same terms and conditions so far as quality was concerned.

We therefore insist that there is nothing rising to the dignity of evidence in the record indicating any actual assignment by the plaintiffs of these contracts to the California Packing Corporation, and in any event its managing officers by their testimony have sufficiently estopped themselves from asserting title to the contracts by taking part as witnesses herein.

The only other arguments presented in support of its twenty-six assignments of error by the plaintiff in error we think necessary to answer are as follows: The order of admitting testimony (Sub-Division 1, p. 22), Brief of Plaintiff in Error. The Defendant in Error of necessity had to rely largely on depositions. Portions of the depositions dealt with the plaintiff's case in chief, while portions were strictly rebuttal. Under these circumstances it was difficult to maintain the proper order of proof, but we submit that no prejudice resulted to the Plaintiff in Error from departing from the usual course of proof.

On page 23 of its Brief, under sub-division 2, it is urged that Weston's deposition was improperly submitted. This testimony, while not proper under the plaintiff's theory of the case, was competent to meet the issue as the Plaintiff in Error attempted to broaden it. As the matters testified to by Weston were not submitted to the jury, no prejudice is conceivable.

Again on page 23 of its Brief plaintiff objects to the court's comment on Ribbeck's testimony. We submit there was no improper comment. Ribbeck emphasized at two different times that the price of $2.50 per dozen, that he fixed as a market price, was *about* the price. He disclaimed knowledge of the market after the middle of September. Wright, his immediate superior, placed the market 15c a dozen higher than Ribbeck at the same time. There were but two witnesses for the defendant who testified to the market price, both were officers of the corporation, while the defendant in error produced six witnesses, some, entirely disinterested, all of whom placed the market at approximately $2.85 per dozen. Another significant fact is that the Plaintiff in Error called Chas. Allen, who was engaged in buying canned fruit for twenty years on the Seattle market, and while he testified as to samples cut from the Everett Company's pack he was not asked and did not attempt to

give testimony as to market. Nor was the plaintiff in error's broker Zinn asked of the market.

We therefore respectfully submit that the trial of these causes was conducted without substantial error, that contracts were properly interpreted and the judgment entered on the verdict of the jury should become final.

Respectfully submitted,

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